Nos. 87-253 et al.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

CHAN KENDRICK, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the District Court erred in holding that the Adolescent Family Life Act, 42 U.S.C. §§ 300z, violates the establishment clause of the first amendment?

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Amici support the position of appellees and respectfully submit that the judgment of the United States District Court for the District of Columbia in the above captioned case be affirmed.[1]

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief of Appellees.

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1 Appellants and Appellees have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the League has previously filed as friend of the court in numerous cases dealing with issues of financing religious education, *see, e.g., Witters v. Washington Department of Services*, 474 U.S. 481 (1985); *Grand Rapids v. Ball*, 473 U.S. 373 (1985), as well as concerning prayer and other religious activities in the public schools, *see, e.g., Bender v. Williamsport*, 475 U.S. 534 (1986); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Abington v. Schempp*, 374 U.S. 203 (1963). In the instant case, the League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty (ARL) is a nonprofit, nationwide educational organization whose members represent the entire religious spectrum. ARL is dedicated to defending religious liberty for all persons. It maintains the defense of religious liberty requires the strictest adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

INTRODUCTION

The Adolescent Family Life Act, 42 U.S.C. §§ 300z ("AFLA"), in its provisions on care and prevention services involving teaching and counseling, authorizes an arrangement whereby the federal government funds the dissemination of religious doctrine concerning marriage, sexual relations and abortion by participating religious organizations. This dissemination occurs at churches or parochial schools. It occurs pursuant to overtly religious Christian curricula prepared by churches. The counseling often involves religious proselytizing—references to "God," to "Jesus Christ," to "Christianity" or "Christian values."

These religious overtones inhere in the AFLA program. It runs afoul of the first amendment establishment clause by being one of "those involvements of religious with secular institutions which . . . serve the essentially religious activities of religious institutions . . . [and] use essentially religious means to serve governmental ends, where secular means would suffice." *Abington School District v. Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring).

It is not simply that government and religious organizations here have a coincidence in mission. For both may oppose the evils of teenage pregnancy and both may share the laudatory goal to counsel against this evil. The issue is whether government may use the shortcut of existing religious organizations' chastity programs to reach its own secular ends. Under an "AFLA" like approach to other life and death issues, such as homicide, where government and religious organizations share concerns, government, instead of, or in addition to, establishing District Attorneys' offices, jails, etc. would finance church sermons and parochial school classes on the Biblical injunctions on "loving one's neighbor." If there were such a program, as in the instant case, government would be financing the missions of certain churches—religious means for secular ends. *See Abington*, 374 U.S. at 295. As under the AFLA, while the ends served would be laudable—the means would be religious and impermissible.

The AFLA program epitomizes the worst danger protected against by the establishment clause—the government sponsoring of religious doctrine to impressionable teenagers. To ask that government create its own programs rather than implement the existing ones of church organizations raises no issue of religious liberty. And, to ask that religious organizations pay for their own counselors frustrates no religious end. To the contrary, it would free the programs of these meddlesome governmental limits necessary to insure that the programs serve their goals free of sectarian indoctrination.

This case presents the first instance of congressional legislation invalidated as a "law respecting an establishment of religion." U.S. Const. amend. I. Most recently reaffirmed in *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987), this Court has long applied a three-part test to determine whether legislation comports with the establishment clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). State action violates the establishment clause if it fails to satisfy any of these prongs. *Amici* herein maintain the AFLA violates all three parts of the *Lemon* test.

The instant case calls for a heightened scrutiny because the Act's programs are targeted to the counseling of teenagers. Where government, religion and school age children are mingled, this Court has shown particular concern. *E.g., Edwards*, 107 S.Ct. 2573, 2577.

Another reason for added concern here is the possibility not merely of some generalized support of government for religion, but rather of preferred support for some religions over others. The objectives served by the AFLA legislation are shared by some religions—namely Christian ones—more than others. Accordingly, the statute offers to some religions great benefits—to others none at all. This presents the worst establishment clause problem—the spectre of the preferred church. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

ARGUMENT

A. THE AFLA'S PREDOMINANT PURPOSE IS TO ENHANCE THE CHASTITY PROGRAMS OF RELIGIOUS ORGANIZATIONS.

The district court below considered whether the enactment of the AFLA was "motivated wholly by religious considerations;" and determined pursuant to this inquiry that the AFLA had a secular purpose. 657 F. Supp. at 1558.

Yet, the relevant purpose inquiry looks not to whether the sole purpose for the AFLA is religious, but rather to which is its "actual," "clear," "chief" or "predominant" purpose. As recently applied by this Court, "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Edwards*, 107 S.Ct. at 2578, *citing Lynch*, 465 U.S. at 668, 690. *See Stone v. Graham*, 449 U.S. 39, 41 (1980).

As applied herein, the relevant inquiry asks what purpose the AFLA serves not adequately served by its predecessor statute, Title VI of the Public Health Service Act. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 59 (1985). *See also May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom. Karcher v. May*, ____ U.S. ____, 108 S. Ct. 338 (1987). Title VI required applicants to involve "public and private agencies," *see* Title VI § 605 (a)(7). The AFLA, however, explicitly *requires* applicants to describe how they will "involve religious and charitable organizations, volunteer associations, and other groups in the private sector. . . ." 42 U.S.C. § 300z-5(a)(21).

In its statutory analysis, the district court rightly noted the AFLA's requirement of involvement of "religious organizations." But the district court held this was not enough evidence of the statute's exclusive religious purpose. 657 F. Supp. at

1559. Yet as discussed *supra*, this is too narrow a statement of the purpose inquiry. The AFLA's language amending the prior statute to include "religious organizations" points to what may have been the "actual" or "preeminent" purpose for the government legislation. *See Edwards*, 107 S.Ct. at 2528. Indeed, as the legislative history indicates, and appellants recognize, through the AFLA Congress expressly intended to draw upon the existing programs of religious organizations. S. Rep. 97-161 at 16, 97th Cong., 1st Sess. (1981), *cited* in Brief for the Appellants at 7-8. This legislative purpose threatens "the core rationale underlying the establishment clause . . . preventing 'a fusion of governmental and religious functions,' " *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982), *citing Abington*, 374 U.S. at 222.

B. INSOFAR AS THE AFLA IMPLEMENTS RELIGIOUS ORGANIZATIONS TO COUNSEL TEENAGERS ON CHASTITY VALUES, IT HAS THE PRIMARY EFFECT OF ADVANCING RELIGION GENERALLY AND IN PARTICULAR THOSE RELIGIONS THAT PROMOTE CHASTITY.

1. The AFLA Prefers Those Religions Which Have Programs Indoctrinating In Favor Of Abstinence And Against Premarital Sexual Relations And Abortion.

a. The AFLA is Unconstitutional Under *Larson* For Discrimination Amongst Religions As Applied.

In funding religious organizations to educate and counsel concerning sex, marriage and abortion just as they would otherwise do, pursuant to their religious mission—through the use of religious curricula, religiously trained counselors and religious locales such as churches or parochial schools, the AFLA subsidizes certain religions in their religious missions, namely, as the record reflects, Catholic organizations.

In evaluating the constitutionality of this scheme, the district court held the AFLA survived "strict scrutiny" under *Larson v. Valente*, 456 U.S. 228 (1982), because the AFLA did not expressly discriminate amongst religions on its face. 657 F. Supp. at 557. Yet, even in the absence of discriminatory statutory language, this Court has long evaluated statutes and governmental policies for the preference or endorsement of one religion over another. *See Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. at 678. Since *Everson v. Board of Ed.*, 330 U.S. 1, 15, this Court has adhered to the principle, that no state can "pass laws which aid one religion" or "prefer one religion over another." As applied, the AFLA discriminates amongst religions insofar as it funds certain religions in the teaching of their values on marriage, sexual relations and abortion, while barring any aid to religions whose approaches differ. Such discrimination serves no compelling interest, and thus violates the test set forth in *Larson*.

b. The Record Shows Participating Religious Organizations Are Exclusively Christian and the Programs Involve Promulgation of Christian Doctrine.

The AFLA only funds the work of those religious organizations adhering to certain views on marriage, sexual relations, and abortion. The funded programs form an integral part of the participating religious organizations' broader education program promulgating their own religious doctrine—and not those of other religions. Thus, the adoption policy of Catholic Family Services, Amarillo, Texas, is "because of its religious doctrine." J.A. 156. The goal of Family of the Americas Foundation's Parental Adolescent Program "[is] to develop and disseminate in educational programs based upon the teachings of the Catholic church." J.A. 390. Catholic Charities of Arlington's program deals with the "values of the Church and community" and "the church's teachings on birth control and premarital sex." R. 155, A, III, 337-347; 222-A; 344-A-B

(Larson exh. 12; West dep. p. 137; Larson dep. pp 46-47). A priest lecturing for Catholic Charities relied throughout on Roman Catholic teachings "basing it all on Jesus Christ," with no mention of Jewish or Protestant teachings. R. 155, A, III-A, 401-403. (Hortum dep. pp. 37-38).

No Jewish organization, Reform, Conservative or Orthodox, has obtained any funding under this Act. While the Jewish view toward marriage, sexual relations and abortion is far from monolithic, it differs sharply from those adopted by the Christian grantee organizations.

As concerns sexual relations and marriage, in Judaism as opposed to Christianity, sex is considered a natural, and not a negative impulse. In Judaism, marriage is the highest human state, and not celibacy, as in Christianity. *Compare Kiddushin* 29b *with Matthew* 19:10. *See Genesis* 2:18, 24.

As concerns marriage and divorce, the Jewish view differs from the Christian in not considering marriage to be a sacrament, since its dissolution is possible. *Compare Deuteronomy* 24:1-4 *with Matthew* 19:16; *Mark* 10:9. As to abortion, most notably in Judaism, the fetus in the womb is not a person. B. Brickner, *Judaism and Abortion, Contemporary Jewish Ethics* 281 (1978), *citing* Rashi, Yad Ramah, & Meiri, *Sanhedrin* 72b. The Jewish view towards the status of a fetus is found in the Mishnah, a code of laws that dates back to the second century and forms the basis of the Talmud. Rashi, its preeminent commentator, explains "as long as the child did not come out into the world it is not called a living being, and it is therefore permissible to take its life in order to save the life of its mother." *Id.* at 271. This Jewish view conflicts sharply with the Christian view concerning the dilemma over the mother and the fetus.

That only the Christian and not the Jewish view on sexual relations, marriage, divorce, and abortion, are being taught pursuant to the AFLA is recognized by programs run by St. Ann's. Its resource material stated:

> Our purpose here is not a discussion of comparative religions. . . . Our purpose is to explain what Christians mean by the transcendent level of life, a sharing in the life of God. . . .
>
> Intercourse between married people is a way of saying with Christ, "my flesh, for the life of the world". . . .
>
> The Jewish law allowed divorce under certain circumstances, but when Jesus was asked "may a man divorce his wife for any reason whatever?" he replied "let no man separate what God has joined."

R. 59 (O'Keefe Dep., Exh. 15).

No government monies should be promoting one religion's values over another. To do so is to threaten the religious beliefs of non-promoted religions. "[T]he first realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." *Abington*, 374 U.S. at 305. The AFLA's programs allow "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *Larson*, 456 U.S. at 255.

2. Under *Lemon*, The AFLA Is Unconstitutional Both On Its Face And As Applied For Having The Primary Effect Of Advancing Religion.

The district court below found the AFLA's funding of teaching and counseling by religious organizations in matters constituting religious doctrine had the primary effect of advancing religion. The court found this impermissible, whether or not all the grantee religious organizations were determined to be "pervasively sectarian," because the financial aid provided under the AFLA as implemented by participating religious organizations is so inextricably tied to religious matters it cannot be confined to secular use; and thus cannot be constitutionally funded by government.

At the heart of the establishment clause's mandate is the bar on government aid to religious goals. "The State must confine itself to secular objectives, and neither advance nor impede religious activity." *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976). Direct aid—not limited to secular use—the Court has consistently found to have a primary effect of advancing religion. *See, e.g., Wolman v. Walter*, 433 U.S. 230 (1977) (provision of field trip transportation to nonpublic school students found to be an "impermissible direct aid to sectarian education"); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of instructional materials and equipment to nonpublic schools found to "inescapably result in the direct and substantial advancement of religious activity"); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (holding maintenance and repair grants to nonpublic schools "subsidize directly the religious activities of sectarian elementary and secondary schools").

The aid provided to religious organizations under the AFLA, the district court held, cannot be restricted to secular use because it directly subsidizes religious organizations in their religious missions. Determining the likelihood that aid will be for religious use is a twofold inquiry. Under *Hunt v. McNair*, it is barred: "when funding flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. at 734.

a. Through Institutional Ties To Religious Denominations and Corporate Requirements, Many of the Participating Religious Organizations Have a Primary Religious Purpose.

The district court below found pursuant to the twofold inquiry in *Hunt* that there is a likelihood of religious use on the face of the AFLA because the Act permits funding of a

number of organizations which are "pervasively sectarian."[2] While this characterization is not dispositive of the constitutionality of aid,[3] it is relevant insofar as the limitation on aid for secular and not religious use simply cannot be drawn by institutions whose activities are permeated by religion. *Hunt*, 413 U.S. 737, 743 (1973).

The test used by this Court and by the district court below is a functional one, which depends on its facts. In its landmark case on the issue, *Bradfield v. Roberts*, the Court looked to a hospital charter of incorporation to determine whether its purpose was religious. 175 U.S. 291 (1899) (upholding construction grant to hospitals whose charter was silent on the question of the hospital's purpose). In *Tilton v. Richardson*, the Court allowed aid where religion did not so permeate the colleges "that their religious and secular functions were inseparable. On the contrary, there was no evidence that religious activities took place in the funded facilities. . . . [A]n atmosphere of academic freedom rather than religious indoctrination was maintained." 403 U.S. 672 (1971). Similarly in *Hunt*, the Court looked to whether "religion is so pervasive" in an institution "that a substantial portion of its functions are subsumed in the religious mission." 413 U.S. 737, 743 (1973). Also relevant to the consideration is the degree of autonomy from the sponsoring denomination, *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976).

As applied to the grantees under the AFLA, the district court below examined the corporate purposes of the grantees

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2 The court used the term "religious organization," which it defined as organizations "that have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." 657 F. Supp. at 1565.

3 The question is not whether an organization is "pervasively sectarian." For even a pervasively sectarian organization such as a church is allowed secular aid such as fire or police protection. *See Everson v. Board of Education*, 333 U.S. 1, 17-18 (1947).

and held under *Bradfield* that at least 10 were "religious organizations" in that they had "explicit corporate ties to a particular religious faith and bylaws or policies that prohibit any deviation from religious doctrine."[4] *See* 657 F. Supp. at 1565 & n.16. In addition to those with formal corporate ties listed by the court below, at least four others were affiliated with religious denominations. Emory University's program is affiliated with the Methodist Episcopal Church. J.A. 504. Brigham Young University's program is "founded, supported and guided" by the Church of Jesus Christ of Latter-day Saints. J.A. 616. Cities in Schools' program is affiliated with an interdenominational religious program, J.A. 572; and Family of Americas Foundation is connected to the Vatican. J.A. 141. Other religious organizations did not have formal institutional ties, but otherwise evidenced "as a substantial purpose the inculcation of religious values." *Aguilar v. Felton*, 105 S.Ct. 3232, 3238 (1985), *citing Nyquist*, 413 U.S. at 767-68.

4 Appellant United Families of America objects to the district court's analysis of adherence to religious doctrine as an element in the court's inquiry as to whether the grantees would be able to serve a secular mission. *See* Brief of United Families of America at 39. Appellant suggests that adherence to religious doctrine need not impede a grantee's fulfillment of a program's secular objective, and that to bar participants on this basis is to burden the grantees' freedoms under the free exercise clause. *Id.*

Appellant's argument is inapposite. The free exercise clause does not require a government subsidy for religious practice. *See McGowan v. Maryland*, 366 U.S. 420 (1961). If it did, the first amendment religion clauses would work at cross purposes. The constitutionality of the government aid at issue hinges on whether an organization's secular and religious objectives may be separated, thus the question of a grantee's adherence to religious doctrine is central. Where the "religious mission" of an organization is pervasive, *see, e.g., Lemon v. Kurtzman*, 403 U.S. at 616, the Court has disallowed government aid, because state financial aid cannot be limited to supporting secular functions exclusively. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 783.

Appellants reject the court's characterization of the grantees. They argue "pervasively sectarian" organizations should be limited to churches and church schools. *See* Brief of United Families of America at 39. Yet if this were the relevant consideration, the Court's inquiry in *Tilton*, *Hunt* and *Roemer* would not have looked toward the colleges' purposes. A similar analysis of the participating religious organizations herein reflects their religious mission, and thus the likelihood of use of the government aid herein for religious impermissible purposes. *Hunt*, 413 U.S. at 743.

The record is replete with evidence showing the AFLA programs have in no way been separated from the underlying religious missions of the participating grantee organizations. To the contrary they form an integral part of the participating organizations' broader religious missions. Catholic Family Services indicated its stance on adoption was "because of its religious doctrine." J.A. 156. Its grant program was regarded as "a welcome addition which will provide new opportunities to carry out the mission." J.A. 155. Similarly, St. Margaret's grant application states its services "are provided in accordance with the teachings and philosophy of the Roman Catholic Church." J.A. 459. *See also* J.A. 407.

b. The AFLA Provides Federal Funding to Religious Organizations To Teach Matters Inherently Tied To Religion.

As applied, the AFLA has the primary effect of advancing religion, under the twofold test set forth in *Hunt*, and this Court's recent *Grand Rapids* decision. What troubled the district court was the utter absence under the AFLA of any "effective means of insuring that public funds will be used exclusively for secular, neutral, and nonideological purposes. . . " *Committee For Public Education v. Nyquist*, 413 U.S. 756, 780. This Court has held the mere risk of government funding of religious indoctrination is enough to invalidate a program. "The lack of evidence of specific incidents of indoctrination" was held to be of "little significance."

Grand Rapids, 105 S.Ct. at 3226. *A fortiori* the instant scheme is unconstitutional. For there are specific incidents of unconstitutional funding found by the district court and conceded by appellants.

The AFLA allows tax dollars "to teach matters inherently tied to religion." 657 F. Supp. at 1565. This religiosity is reflected in the curriculum used for AFLA programs, in the lectures of the government funded teachers, in the religious symbolism of the program sites, which are often parochial schools, churches or meeting rooms adorned by crucifixes. This Court has never before allowed government funding for religious books, *see Board of Education v. Allen*, 392 U.S. 236 (1968), for salaries of teachers of religious courses, *McCollum v. Board of Education*, 333 U.S. 203 (1948), nor for teachers of any subject, secular or religious, when the courses are on church or parochial school premises. *Grand Rapids*, 473 U.S. 373; *Lemon*, 403 U.S. 602. Yet this aid is precisely what the AFLA allows.

i. Religious Materials

The use of curricula expounding church doctrine reflects the religiosity of the AFLA funded programs. Government sponsorship of such religious materials has long been unconstitutional. *See, e.g., Abington v. Schempp*, 374 U.S. 203. The district court found St. Margaret's used curricula including explicitly religious materials. J.A. 36a. Catholic Charities of Arlington's program included discussions regarding "the Church's teaching on birth control [and on] premarital sex." R. 155, A, III at 342 (Larson exh. 12, Doc. 4477). The religious curriculum outline used by St. Ann's AFLA program discusses "the Christian tradition" of marriage and relies on Biblical material concerning sexual relations and marriage. Catholic Charities' grant program employed a religious bibliography entitled "Reverence for Life and Family" used in several dioceses for Catholic sex education in parochial schools. *See* J.A. 115-116. *See also* J.A. 379 (Families of the Americas Foundation's pamphlet on "The Christian Alternative, Billings Ovulation Methods" which says the ovulation method helps

show "the family is an integral part of the Church."). Center for Life's Adolescent Program materials provide "a more Christian pro-life education in sexuality," and refer to "a fully human Christian understanding of life and love." J.A. 370-371.

ii. Religious Teaching

Religious indoctrination is not a mere possibility; it is actuality here. The instructors used in the AFLA programs, many of whom are involved in the grantees' non-AFLA religious programming, include church ministers, *see* J.A. 485 (GUAGT Program) or instructors from area churches, *e.g.*, J.A. 476 (SEMO). SUMA and Catholic Charities of Arlington used "spiritual counseling," and "religious discussions" in the midst of an AFLA program. J.S. App. 36a-37a. As this Court recognized in *Lemon* and in *Grand Rapids*, the services of the state-supported—but religiously trained—teachers herein cannot remain purely secular. In *Grand Rapids*, this Court held that parochial school teachers, trained to educate pursuant to the tenets of their church, would not be able to switch gears after the regular parochial schoolday so as to teach an entirely secular course, *see* 105 S. Ct. at 3224. Yet this improbability is exactly what is expected under the AFLA.

iii. Religious Sites

In addition to using religious curricula, many of the grantees conducted their teaching and counseling at churches, parishes and Catholic schools. These included Catholic Social Services, S.W. Ohio; Catholic Charities of the Diocese of Arlington, VA; Families of the Americas, Inc.; Catholic Family Services; and St. Ann's. J.A. 114, 117, 340, 379, 448, 449, 456. Other program sessions have been conducted in meeting rooms adorned with religious symbols, such as crucifixes. J.A. 299; 437 (St. Ann's); J.A. 463 (St. Margaret's).

Government funded programs, this Court has held, may not be conducted on churches or parochial school sites lest there be the appearance of government support of religion. *See Grand Rapids*, 105 S. Ct. at 3225. The Court has also recognized that

religious symbols cannot be endorsed by government. *See Stone v. Graham*, 449 U.S. 39 (1980). *See also ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458 (1986) (holding cross is the fundamental symbol of Christianity and cannot be sponsored by government). The Court held in *Grand Rapids* that "students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." 105 S. Ct. at 3225. *A fortiori*, the effect of advancing religion is even stronger here than in *Grand Rapids* because unlike the secular education courses taught in the parochial schools in *Grand Rapids*, the AFLA programs involve the teaching at religious sites of fundamental Christian doctrine.

The holding of AFLA programs on such sites presents a twofold problem. To the believing adolescent it sends a message of endorsement of Christianity. To the unaffiliated adolescent, it sends a further message of exclusion at a time already marked by alienation. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

iv. Impressionable Teenagers

In funding teaching and counseling on matters related to religious doctrine, the AFLA allows a worst case scenario of "direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs." *Grand Rapids*, 105 S.Ct. at 3226. Like the program in *Grand Rapids*, the AFLA program contemplates teaching of high school aged children by government funded teachers at religious sites. But, unlike the programs in *Grand Rapids* which involved classes in groups, the AFLA contemplates one on one counseling—the situation most ripe for abuse.

"Examination of both the subjective and objective components of the message communicated by a government action is . . . necessary." *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). In addition to the objective aid to religious doctrine provided by the AFLA, the district court considered the

subjective element presented by the school age children affected by the program. "[T]he statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and underinformed adolescent to whom the instruction is directed." 657 F. Supp. at 1563. This Court has long recognized the relative susceptibility of elementary and secondary school age students to indoctrination. *Compare Lemon*, 403 U.S. 602, *with Tilton v. Richardson*, 403 U.S. 672, 686 (1971). *Cf. Widmar v. Vincent*, 454 U.S. 263, 271. Adolescents are considered by the Court to be impressionable and thus more likely to misunderstand government support for the program herein as government support for religion. *See Edwards*, 107 S.Ct. at 2577.

The problems raised by the implementation of the AFLA cannot be dismissed as isolated establishment violations as the government suggests. *See* Brief for the Appellant at 41. These problems show that the religious nature of the grantee organizations, as well as the inherent tie to religion in funding the instant services, make it difficult to separate the secular from the religious as the first amendment's neutrality mandate requires.

c. The Effect of Advancing Religion is Not Mitigated by the AFLA's Extension of Government Aid to Nonreligious Organizations.

Though the instant program allows direct aid to religious organizations for teaching of matters related to religious doctrine, appellants maintain the establishment clause permits such aid so long as it is also provided to nonreligious organizations; this, appellants suggest, makes the aid "neutral" in nature.[5] *See* Brief of United Families of America at 20-32. Yet this is not the "neutrality" the establishment clause requires. The establishment clause here takes precedence over any fa-

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5 Appellant notes the statute is neutral on its face, and that in practice about one fourth of the grantees are religiously affiliated. Brief of United Families of America at 25 n.14.

cially evenhanded treatment of secular and sectarian organizations. The bar against funding for religious use presents a problem solely for religiously affiliated organizations and this narrows the analysis. *See Lemon*, 403 U.S. at 612.

In one case after another involving state aid to private institutions of higher education, this Court has focused not on the neutrality or merits of state programs as a whole, but rather on the eligibility for aid of specific sectarian recipients. In *Roemer*, for example, the Court analyzed whether four Catholic colleges in Maryland could receive state funds available to all private schools of higher education in that state. 426 U.S. 736 (1976). In *Tilton*, 403 U.S. 672, this Court focused specifically on four church-related colleges in Connecticut to determine their eligibility for federal grants also offered to many other schools. In *Hunt*, 413 U.S. 663, this Court considered the eligibility of one Baptist-controlled college to benefit from the issuance of revenue bonds intended to support all private colleges in South Carolina. In each of these decisions, the Court recognized the secular nature and overall merit of the states' efforts to assist private colleges and universities. Nevertheless, as the *Hunt* Court emphasized, to identify primary effect it is necessary to narrow the Court's focus "from the statute as a whole to the only transaction presently before us." 413 U.S. at 744. To do otherwise here would be to depart from those establishment clause precedents which have long served effectively to ensure the separation of church and state by limiting government aid to secular use.

Further, the examples of "neutral" aid appellants rely on, which have been permitted to an array of religious and nonreligious beneficiaries, are fundamentally difficult from the aid for teaching and counseling herein. Police and fire protection have long been afforded even to "pervasively sectarian" organizations, *see Everson v. Board of Education*, 333 U.S. 1 (1947). *See also Committee for Public Education v. Regan*, 444 U.S. 646 (1980) (tests); *Wolman v. Walter*, 433 U.S. 230, 241 (1977) (diagnostic services). Unlike government funding of teachers, this sort of government aid presents no risk of

converting from permitted secular to forbidden religious use. See *Grand Rapids*, 105 S. Ct. at 3225; *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968) (secular textbooks).

Greater flexibility has been countenanced when government aid goes not directly to a religious institution but indirectly to an individual. It is the "indirect" nature of aid allowed to an individual, and, not the array, the Brief of United Families at 25, to the contrary, which mitigates the effect of government funding for religious training.[6] *See, e.g., Witters v. Washington Department of Services*, 106 S. Ct. 748, 752 (1986). *See Widmar v. Vincent*, 454 U.S. 263 (1981). *See also Mueller v. Allen*, 463 U.S. 388, 398-400 (1983).

Here, unlike in *Witters*, *Mueller*, or *Widmar*, the AFLA affords no aid to individual beneficiaries. There is no private action to attenuate the message of direct government funding to religious organizations for religious education.

C. INSURING THE AFLA IS CONSTITUTIONALLY IMPLEMENTED EXCESSIVELY ENTANGLES STATE AND RELIGION IN VIOLATION OF *LEMON*.

1. Implementing the AFLA Involves Unconstitutional Administrative Entanglement of Government and Religious Institutions.

Under *Lemon*, the AFLA may not foster an "excessive governmental entanglement with religion." 403 U.S. at 612-13. The district court below held the "religious organization" grantees had such religious character and purpose that insuring AFLA funds were isolated only for secular uses would require

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6 Another form of indirect aid is presented by *Walz v. Tax Commission*, 397 U.S. 664 (1970). *Walz* involved an extension of tax exemption to churches. In so doing, *Walz* obviously did not stand for the proposition that it is all right for government to fund churches. Rather, *Walz* presented the Hobson's choice either of government affording churches an exemption, and thus helping churches financially or churches paying taxes and thus aiding government. Presented with these choices, the Court held an exemption would involve less ongoing involvement between government and religious organizations—ultimately advancing the separation of church and state.

a level of surveillance constituting "excessive entanglement." 657 F. Supp at 1567.

Moreover, since the aid at issue is funding for teaching or counseling services, the risk of advancing religion by these religious organizations is attendantly greater—necessitating, the court found, "continual governmental monitoring." 657 F. Supp at 1568.

> Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.
>
> . . . .
>
> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.
>
> . . . .
>
> These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 618-619.

Even the mere potential of such continuous monitoring of government with religion in situations involving state funded teaching has been deemed excessive and violative of the first amendment. *See Aguilar v. Felton*, 473 U.S. at 410. But, under the AFLA, such continual monitoring is not a risk, but a reality.

The record reflects that government has already been involved in continuous supervision of the religious organizations for abuses in the AFLA programs. In conceding the "departure from proper constitutional principles in individual AFLA programs," Brief of Appellant at 40-41, the government noted that the unconstitutional abuses in the AFLA programs, including "religious discussions" J.S. App. 36a (SUMA), were rapidly "met with firm action by the Secretary." *Id.* at 41. The

supervision has included correspondence, J.A. 518 (HHS letter to St. Margaret's); J.A. 674 (HHS letter to St. Ann's), personal conferences, J.A. 92, and telephone calls, between government officials and religious organization personnel. J.A. 106-107, 112-113, 160 (HHS would affirmatively call Catholic applicants to seek assurances that they would not promote religion).

The AFLA's implementation has already required excessive contacts between administrative personnel of government and church-affiliated organizations. This joining of government and religious enterprises violates the establishment clause's "objective . . . to prevent as far as possible, the intrusion of either [church or state] into the precincts of the other." *Aguilar*, 105 S. Ct. at 3239, *citing Lemon*, 403 U.S. at 614.

Paradoxically, the entangling aspects of the AFLA ultimately diminish the religious freedom of the "benefitting" religious organizations. As held by this Court in *Aguilar*, aid of the sort contemplated here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." 105 S.Ct. at 3241, *citing Walz*, 397 U.S. 664.

2. The AFLA Presents Problems of Political Divisiveness Amongst Religions.

In addition to the administrative entanglement present herein, the AFLA "involve[s] a direct subsidy to . . . religious institutions, *see Lynch*, 104 S.Ct. at 1365, *citing Mueller v. Allen*, 103 S.Ct. 3062, 3071 n.11 (1983), and thus triggers political divisiveness amongst religions.

Given the major distinctions amongst religions on the issues taught pursuant to the AFLA, discussed *supra*, competition for funding under the Act automatically results in political divisiveness along religious lines. *See Lemon*, 403 U.S. at 622. This is one of the central dangers against which the establishment clause was designed to protect. *See Committee for Public*

Education v. Nyquist, 413 U.S. at 798. As Justice Harlan declared, governmental involvement in programs concerning religion:

> [M]ay be so direct or in such degree as to engender a risk of politicizing religion. . . [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against. . . . [G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.

Larson, citing Walz, 397 U.S., at 695 (concurring).

CONCLUSION

For all the reasons above, *amici* ask that the AFLA be declared unconstitutional in violation of the first amendment establishment clause.

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